Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1209

THE COASTAL CORPORATION, OSCAR S. WYATT, JR., H. L. BLOMQUIST, JR., GEORGE L. BRUNDRETT, JR., ERVIN O. BUCK, HAROLD BURROW, ROY L. GATES, CHARLES F. JONES, J. HOWARD MARSHALL, EDWARD J. MOSHER, WILL ODOM and FLETCHER L. YARBROUGH,

Petitioners,

—against—

JOAN WEISBERG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

MICHAEL LESCH
230 Madison Avenue
New York, New York 10017
(212) 661-3200
Counsel for Petitioners Oscar S. Wyatt, Jr., H. L. Blomquist, Jr., George L. Brundrett, Jr., Harold Burrow, and Roy L. Gates

Of Counsel
SHEA & GOULD
RICHARD F. CZAJA

BERNARD W. SCHRADER
Suite 832A
Nine Greenway Plaza
Houston, Texas 77046
(713) 877-6859
Counsel for Petitioner The Coastal Corporation

Of Counsel
ROBERT E. WALLS

ASA ROUNTREE
299 Park Avenue
New York, New York 10017
(212) 752-6400
Counsel for Petitioners Ervin O. Buck, Charles F. Jones, J. Howard Marshall, Edward J. Mosher, Will E. Odom, and Fletcher L. Yarbrough

Of Counsel
DEBEVOISE, PLIMPTON, LYONS & GATES
ROGER E. PODESTA

March 21, 1980

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Respondent, in her opposing brief ("resp. br."), fundamentally misconstrues the question before the Court. Respondent states this question as whether "the solicitation of proxies [is] an essential link in the election of directors of a publicly held company . . ." (resp. br. p. 3; *see also,* resp. br. p. 5). Manifestly the answer to this question can only be in the affirmative. However, the question raised by the instant petition is not the triviality discussed in respondent's brief, but rather is whether the solicitation of proxies was an "essential link" in an alleged breach of fiduciary duty which was never ratified by the shareholders of petitioner The Coastal Corporation ("Coastal")

or submitted to the shareholders for ratification. As set forth in the petition (at p. 9), prior to the instant case, the unanimous view of courts considering this issue (including that of the Ninth Circuit in *Abbey* v. *Control Data Corp.*, 603 F.2d 724, 731-732 (8th Cir. 1979), *cert. denied*, —— U.S. ——, 100 S. Ct. 670 (1980) was that no such "essential link" existed, and that the proper forum for a shareholder to pursue claims of alleged breaches of fiduciary duty was in state court.

Respondent implies that in no case relied upon by petitioners was equitable relief sought (resp. br. p. 5). As set forth in the petition, the relief sought cannot create a section 14 cause of action where none would otherwise exist. In any event, respondent's assertion is erroneous.[1] In *Herman* v. *Beretta*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,574 (S.D.N.Y. 1978), the court held that a section 14(a) claim was not stated notwithstanding the fact that plaintiff sought equitable relief identical to that sought herein:

> *Plaintiff seeks to distinguish the instant case on the basis of the relief sought here: damages and the voiding of all "tainted" elections. The request for an additional remedy, i.e., the voiding of elections, does not cure the defect in plaintiff's Section 14(a) claim.* This Court has not found, nor has plaintiff provided, any precedent or persuasive arguments why injunctive relief should be available to a plaintiff whose complaint fails to meet the "transaction causation" requirement. *Cf. In re Tenneco Securities Litigation*, CCH Fed. Sec. L. Rep. ¶96,492 (S.D. Texas 1978); *Kamerman* v. *Pakco Companies, Inc.*, CCH Fed. Sec. L. Rep. ¶96,318 (S.D.N.Y. 1978).

(footnote omitted, emphasis supplied) [1978 Transfer Binder] (CCH) at p. 94,408.[2]

Similarly, in *In re Tenneco Securities Litigation*, 449 F.Supp. 528 (S.D. Tex. 1978), plaintiff sought "only injunctive relief voiding prior elections and prohibiting defendants from violating the securities laws" (449 F.Supp. at 530). The court stated:

> This court is not aware of the existence of any case brought pursuant to Section 14(a) in which prior elections of directors have been voided under similar or even analogous circumstances. It is clear to the court that such relief would only raise a myriad of problems such that the potential harm to the corporation and stockholders would be more damaging than that alleged as the basis for the federal claim in this lawsuit.
>
> The true nature of this action is a claim for monetary relief under state law for breach of fiduciary duty and waste of corporate funds. Full relief is available to plaintiffs under state law. . .

449 F.Supp. at 532.

Respondent's misstatement of the questions presented to this Court also renders the authority relied on by her entirely inapposite. *Berkman* v. *Rust Craft Greeting Cards*, 454 F.Supp. 787 (S.D.N.Y. 1978) (resp. br. p. 4), was an

[1] An apparently similar implication appears in the opinion of the Second Circuit ("In the cases relied on by appellees, the plaintiffs sought damages because of allegedly improper payments. . ." (609 F.2d at 654; appendix to petition at 8a-9a; quoted in resp. br. at pp. 3-4)). (Since the filing of the petition, the opinion of the Second Circuit has been officially reported at 609 F.2d 650.)

[2] It is clear from the quotation in the text that the *Herman* court's further observation that the claim for equitable relief was moot was not the basis for its holding that plaintiff failed to state a section 14 claim. The Second Circuit's purported distinction of *Herman* on this ground (609 F.2d at 654 n.3; Appendix to the Petition at 9a n.3) is therefore without basis.

application by two members of a corporation's board of directors to preliminarily enjoin the solicitation of proxies for the election of directors, where the following misstatements in the proxy materials were alleged:

(1) That the slate of nominees was approved over the dissent of two directors;

(2) That the stated reason for the dissent was that four of Rust Craft's directors had withheld from their fellow directors material information relating to an advising investment banking firm's debenture purchase and resultant conflict of interest; and

(3) That the conflict led the board to engage a new and unquestionably independent investment banking firm to render a further opinion concerning a fair cash price for Rust Craft stock. The *Berkman* case is thus manifestly distinguishable from a case alleging violations of fiduciary duty by reason of allegedly improper payments.

Similarly, *Rafal* v. *Geneen* [1972-73 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶93,505 (E.D.Pa. 1972), relied upon by respondent (resp. br. p. 4), dealt with a failure to disclose that nominee directors were defendants in lawsuits alleging improper insider trading, not with allegations of improper corporate payments. This case is thus also inapposite.[3]

It is respectfully submitted that respondent's inability to state a single cogent argument in support of the result reached by the Second Circuit amply demonstrates the

[3] Respondent apparently also argues that the individual petitioners "were not parties to the rule 54(b) judgment" (resp. br. p. 1). While this contention has no bearing on the instant application, it is, in any event, erroneous. The rule 54(b) judgment provided for the unqualified dismissal of respondent's first claim stating "... it is, ORDERED, ADJUDGED and DECREED: That plaintiff's first and fifth claims be and they are hereby dismissed."

necessity for the issuance of a writ of certiorari to review the opinion and judgment.

Respectfully submitted,

MICHAEL LESCH
330 Madison Avenue
New York, New York 10017
(212) 661-3200
Counsel for Petitioners
Oscar S. Wyatt, Jr., H. L. Blomquist, Jr., George L. Brundrett, Jr., Harold Burrow and Roy L. Gates

Of Counsel

SHEA & GOULD
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BERNARD W. SCHRADER
Suite 832A
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